IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 27

UNITED STATES OF AMERICA,

Appellant,

—v.—

CONTAINER CORPORATION OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
JAMES W. HARBISON, JR.
120 Broadway
New York, New York 10005
Attorneys for Container Corporation of America

SIMPSON THACHER & BARTLETT
Of Counsel

JOSEPH C. CARTER, JR.
700 East Main Street
Richmond, Virginia 23212
Attorney for Albemarle Paper Manufacturing Company and Miller Container Corporation

HUNTON, WILLIAMS, GAY, POWELL & GIBSON
Of Counsel

W. P. SANDRIDGE
W. F. WOMBLE
Drawer No. 84
Winston-Salem, North Carolina 27102
Attorneys for Carolina Container Company

WOMBLE, CARLYLE, SANDRIDGE & RICE
Of Counsel

HELMER R. JOHNSON
CHARLES E. LEWIS
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Continental Can Company, Inc.

WILLKIE FARR & GALLAGHER
Of Counsel

(Counsel continued on inside cover)

	HOWARD T. MILMAN ROBERT D. KRUMME 48 Wall Street New York, New York 10005
SULLIVAN & CROMWELL *Of Counsel*	*Attorneys for Crown Zellerbach Corporation*
	DAVID J. MAYS JOHN W. EDMONDS III 1200 Ross Building Richmond, Virginia 23219
MAYS, VALENTINE, DAVENPORT & MOORE *Of Counsel*	*Attorneys for Dixie Container Corporation and Dixie Container Corporation of North Carolina*
	ALAN W. BOYD LOUIS A. HIGHMARK 1313 Merchants Bank Building Indianapolis, Indiana 46204
BARNES, HICKAM, PANTZER & BOYD *Of Counsel*	*Attorneys for Inland Container Corporation*
	LAWRENCE E. WALSH HENRY L. KING 1 Chase Manhattan Plaza New York, New York 10005
DAVIS POLK & WARDWELL *Of Counsel*	*Attorneys for International Paper Company*
	FORD W. EKEY JON M. SEBALY Talbott Tower Dayton, Ohio 45402
SMITH & SCHNACKE *Of Counsel*	*Attorneys for The Mead Corporation*
	FRED E. FULLER JAMES A. SPRUNK 405 Madison Avenue Toledo, Ohio 43604
FULLER, SENEY, HENRY & HODGE *Of Counsel*	*Attorneys for Owens-Illinois Glass Company*
	RICHARD A. WHITING ROBERT M. GOOLRICK 1250 Connecticut Avenue Washington, D. C. 20036
STEPTOE & JOHNSON *Of Counsel*	*Attorneys for St. Joe Paper Company*
	HORACE R. LAMB H. RICHARD WACHTEL 1 Chase Manhattan Plaza New York, New York 10005
LEBOEUF, LAMB, LEIBY & MACRAE *Of Counsel*	*Attorneys for St. Regis Paper Company*
	JAMES H. EPPS, JR. JAMES A. WELLER 2101 North Roan Street Johnson City, Tennessee 37601
EPPS, POWELL, WELLER, TAYLOR AND MILLER *Of Counsel*	*Attorneys for Tri-State Container Corporation*
	JAMES R. WITHROW, JR. 2 Wall Street New York, New York 10005
DONOVAN LEISURE NEWTON & IRVINE *Of Counsel*	*Attorney for Union Bag-Camp Paper Company*
	E. NOBLES LOWE 299 Park Avenue New York, New York 10017
	Attorney for West Virginia Pulp and Paper Company
	FRED B. HELMS 800 North Carolina National Bank Building Charlotte, North Carolina 28202
HELMS, MULLISS, MCMILLAN & JOHNSTON *Of Counsel*	*Attorney for Weyerhaeuser Company*

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In the

Supreme Court of the United States

October Term, 1968

No. 27

United States of America,

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BRIEF FOR APPELLEES

The several appellees ("defendants") join in this single brief because, although the facts vary considerably with respect to each of them, appellant's ("plaintiff's") case rests upon those facts which are common to all defendants, and analysis of the facts and the applicable law demonstrates that the district court properly dismissed the complaint.

Question Presented

The frame of this appeal is set askew by the plaintiff's statement of the questions presented, which is premised on a factual assumption unsupported by the evidence and squarely contradicted by the stipulations of plaintiff at

trial and the agreed upon findings of the district court.* Thus, we will show that plaintiff's statement of the questions presented is not accurately expressed in the terms and circumstances of the case. There is only this question:

> Whether the district court erred in finding that the requesting and furnishing of price information by these defendants in the manner, for the purpose, and with the effect stipulated or agreed to by the parties, and found by the district court, does not constitute an agreement or combination among the defendants in restraint of trade or commerce within the meaning of, or in violation of, Section 1 of the Sherman Act.

Statement

1. *The Proceedings Below*

Substantially all of the facts were stipulated before trial under procedures carefully supervised by the district court pursuant to modern pretrial rules, and after the plaintiff had had ample opportunity to verify each of the facts.

The plaintiff began work on the case with an enormous reservoir of evidence since a grand jury investigation (from which no indictment resulted) had provided the testimony of large numbers of witnesses and hundreds of thousands of documents. The plaintiff then took pretrial

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* The district court's findings of fact and conclusions of law are reported at 273 F. Supp. 18. As used herein, "F." refers to the district court's numbered findings of fact. "CX" refers to exhibits admitted by agreement as court's exhibits. "Tr." refers to the transcript of proceedings in the district court. "PX" refers to plaintiff's exhibits. "DX" refers to defendants' exhibits, "D.P.F." refers to Defendants' Proposed Findings of Fact and Restatement of Certain Findings of Fact Proposed by the Plaintiff and "Br." refers to plaintiff's brief in this Court. "App." refers to pages in the appendix on this appeal.

depositions of 34 employees of the various defendants and was furnished with a great bulk of additional material, either at the plaintiff's request or tendered by the defendants.

As a result of many months of labor of counsel, and many pretrial conferences, it became clear that there were no substantial factual disputes and the depositions and much other evidence were compressed into stipulations of fact. Thereafter, painstaking preparation and cooperation made it possible to limit the actual time for presentation of evidence to a day and a half. This was followed by very detailed briefing and two days of oral argument before the district court.

After trial, counsel cooperated in preparing, exchanging and commenting upon proposed findings of fact. The result was that the findings of fact made by the district court had been agreed to by plaintiff almost without exception. The agreed findings, and the few contested findings based on the district court's own review of the stipulations, depositions and hundreds of documents, are unassailable in this Court because they are all squarely supported by the evidence.

2. *The Issue*

It will help to focus the issue in this Court if we first point out what this case is *not* about:

> There is no charge—and no proof—that any defendants, at any time, fixed prices or attempted to fix prices either generally or to any specific customer. The facts were such that, after full investigation, the plaintiff stipulated that every price decision of each of the 18 defendants during the entire eight years of the

alleged conspiracy had been determined by that defendant individually in the exercise of its own business judgment, taking into account all of the factors which normally influence price decisions in the absence of any agreement or combination affecting price (F. 22 [App. 494-5], F. 28 [App. 496-7], D.P.F. 28 [App. 69-70], D.P.F. 34 [App. 71-2]).

There is no charge—and no proof—that prices have been stable or uniform or parallel as among any defendants. The only evidence offered as to prices—that offered by defendants—proved, beyond quibble, the absence of any general uniformity, harmony, stability or parallelism in prices of the various defendants, and that price trends varied widely among the several defendants both as to direction and as to degree (F. 21 [App. 494], DX-6 pp. 36-46 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III pp. 36-46]). (We know of no Sherman Act case alleging a combination or conspiracy to restrict price competition where there was even remotely similar evidence.)

There is no charge—and no proof—that prices were artificially high or that profits were such as to permit an inference of restricted competition. In fact, during the eight year period covered by the complaint, prices of commodities and services generally were increasing, and the defendants' costs were increasing, yet defendants' prices declined (F. 15 [App. 489-90], DX-6 p. 1 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III p. 1]).

There is no charge—and no proof—that the defendants allocated customers, or agreed not to take each other's customers by cutting prices. The plaintiff stipulated, again compelled by the facts, that each of the more than 10,000 purchasers of corrugated containers in the Southeastern United States had nu-

merous sources of supply, both actual and potential, and that although customers generally did not shift suppliers except when offered a better price by a new supplier, customers did in fact frequently shift all or part of their business from one supplier to another (F. 9 [App. 487-8], F. 10 [App. 488], F. 17 [App. 490], DX-6 pp. 21-4 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III pp. 21-4]). For example, we find the stipulated evidence that Container Corporation had 3,132 customers in 1960 (F. 18(a) [App. 491]); 1,209 of these customers had bought nothing from Container in 1959 and, by stipulation, can be presumed to have been taken by Container from its competitors as a result of price cutting (F. 17 [App. 490]). Moreover, 1,210 of Container's 1960 customers bought nothing from that company in 1961, again presumably because of price cutting by its competitors, as customers generally did not shift suppliers except on the basis of lower prices (F. 17 [App. 490], F. 18(a) [App. 491]).

This case does not involve a systematic practice of price communication or any "exchange" of information. Only in infrequent situations was price information requested from a competitor and then principally to verify a customer's report of a competitor's lower price (F. 29 [App. 497], F. 30 [App. 497], *e.g.*, F. 69 [App. 509]). Thus, for example, International Paper had only two to twelve calls a month, including both the requests it made for information and the answers it gave to the requests of others, while at the same time its salesmen were averaging 1,800 to 2,000 calls per month on customers and prospective customers (F. 158 [App. 526-7], F. 159 [App. 527]).

It is even conceded that no employee of any defendant ever discussed with any employee of any other

defendant the desirability of furnishing price information, the fact that price information had been or was being communicated, the frequency of such communication, the consequences of requesting or failing to request such information, the method of communicating, or the action to be taken or not to be taken with respect to any such information (F. 34 [App. 498]).

Nor is there any evidence that any customer was injured or paid a higher price because of the conduct of the defendants, or felt in any way prejudiced by the conduct of any defendant. Over a year before the trial, the plaintiff was given the names of each of the more than 10,000 customers of the defendants and, finally elected to call none as a witness (F. 20 [App. 493-4]).

With this background, the plaintiff's purely theoretical argument on this appeal emerges. It is that obtaining information from a competitor as to the price it had charged in its most recent actual sale is *per se* illegal under the Sherman Act, irrespective of why this information is sought or how it is used or what effect it has on prices or on competition generally. Here, when the information was obtained from a competitor it was used in exactly the same way as when the same information was obtained, as it usually was, from the customer himself, *i.e.*, as only one of many factors considered in making an admittedly independent pricing decision (F. 22 [App. 494-5], F. 28 [App. 496-7]). There simply is no evidence that defendants had any different purpose in seeking price information from a competitor than when they sought it from a customer. Obtaining of price information from a competitor had no different effect upon competition than obtaining it from the customer.

The only pertinent fact relied on by the plaintiff and proved below was the occasional receipt by each defendant of past price information from another defendant. The plaintiff's concept is that it is illegal to obtain knowledge of a factor which an informed trader would take into account in determining what price he, as a matter of completely individual decision, should decide to offer a customer in his effort to compete vigorously for the business of that customer, fully free to cut prices or do anything else he wishes to get the business of that customer. From this single fact common to all defendants, the plaintiff would have this Court infer the agreement, purpose and effect necessary to constitute a Sherman Act violation, ignoring in the process the evidence, stipulations and agreed findings of fact which preclude the making of such inferences. It thus seeks to substitute a new and hypothetical framework for the stipulated factual case upon which issue was joined and upon which the district court correctly decided that there was no agreement to restrain trade and no restraint of trade.

3. *The Facts*

As the plaintiff's brief ignores its stipulations and relies not upon the evidence but upon asserted inferences from the evidence and hypotheses contrary to the evidence, it is particularly important that the facts be stated properly. Therefore, before analyzing the plaintiff's argument, we correctly set forth the factual premises.

What conduct is involved?

The conduct upon which the complaint is based is simply this: For longer than anyone can remember, members of

this industry have, on occasion, requested from a competitor information as to the latter's most recent price to a specific customer for specific corrugated containers, and usually—not always—the information was furnished (*e.g.*, F. 238 [App. 544], F. 239 [App. 544]). The need for such price communication arose from the fact that there are no published price lists for corrugated containers which are custom made to fit each of the multitude of products shipped in them, e.g., a container for each particular chair must fit exactly or it will scuff the surface (F. 5 [App. 486]). The plaintiff agreed to a finding that in order to compete effectively in this industry, each defendant had a vital need for information as to the price alternatives available to its customers or prospective customers (F. 19(a) [App. 492-3]; D.P.F. 25(a) [App. 66-7]). Moreover, from the stipulated facts as to each defendant the district court concluded that:

> "The defendants were at all times free to request from or furnish to competitors, or not request from or furnish to competitors, information as to prices for corrugated containers, and whether or not to request or furnish such information was the individual decision of each defendant." (273 F. Supp. at 59 [App. 566]; *see* F. 35 [App. 498]).

How frequently, and on what occasions, did a defendant request price information?

The district court found that price information was requested from a competitor only infrequently, and only if it was not available from any of the more usual sources, *i.e.*, either a defendant's own records of its past sales to the customer or the customer itself, since secret or closed bidding was not the practice in the industry, and purchasing agents,

after receiving a price from one defendant, often solicited other defendants to meet or beat that price, which they often did (F. 19 [App. 492-3], F. 29 [App. 497]). When information was requested from a competitor, it usually was for the purpose of verifying information received from a purchasing agent, for purchasing agents, on occasion, furnished suppliers with incomplete, inaccurate or misleading information as to the prices of competing suppliers (273 F. Supp. at 59 [App. 565-6]; F. 28 [App. 496-7], F. 30 [App. 497]; *e.g.*, F. 69 [App. 509], F. 157 [App. 526]). Thus, when a defendant verified the report from a customer of a competitor's price, it was in no better position than it was before the inquiry, except in those instances when the customer had lied to that defendant, and we do not understand it to be any part of the purpose or policy of the Sherman Act to protect untruthfulness.

Except to verify the veracity of a purchasing agent, a defendant did not request price information from a competitor with respect to its own customers, for if a defendant had recently sold corrugated containers to a customer, that defendant usually would, in the absence of changed conditions, charge on the basis of the price revealed in its own records of prior transactions. (F. 23 [App. 495], F. 29 [App. 497]).

The plaintiff's contention that it was the purpose of the defendants to mitigate price competition by "rapid dissemination of current price information," (Br. pp. 27-8) is rebutted by its own stipulations. The plaintiff agreed that no defendant ever volunteered its past price to any other defendant, but merely furnished information on the infrequent occasions when it was requested; and that a defendant requesting past price information was not asked and did not volunteer the price it had last charged or quoted, much less the price it currently intended to charge for its own product (F. 31 [App. 498], F. 33 [App. 498]).

The parties also stipulated that, when past price information was not available from the defendant's own records or from the purchaser and the defendant found that price information was necessary in order to compete effectively, a defendant "usually" requested that information from a competitor and the competitor either "usually" or "sometimes" furnished it (*e.g.*, F. 117 [App. 518], F. 118 [App. 518], F. 238 [App. 544], F. 239 [App. 544]). The plaintiff's argument, on the other hand, is predicated on the assertion that the information was always requested and always furnished (Br. p. 5). This erroneous assertion forms the premise for several of the plaintiff's arguments, including, for example, the argument that an agreement to furnish information on request may be inferred from the fact that the information was requested "whenever" it was not otherwise available and was furnished "whenever" requested.

The same observation can be made with respect to the asserted existence of "a regular practice of requesting and obtaining" (Br. p. 4) price information from competitors when the requesting and furnishing in fact occurred infrequently, irregularly, and in limited circumstances. The uniform pattern of conduct which the plaintiff postulates does not, in fact, exist. A competitor was always uncertain whether another supplier had reduced its price unless that competitor was so advised by the customer himself—and even then the competitor could not confidently rely on the customer's word. Thus, the uncertainty which the plaintiff demands was always present, for each defendant, as stipulated, remained free at all times to determine individually the price it would seek to charge (F. 28 [App. 496-7]).

What price information did the defendants in fact communicate?

Perhaps the most pervasive non-fact in the plaintiff's brief is the assertion that the information requested and obtained was "the price his competitor is asking." (Br. p. 2) The plaintiff, with full access to the facts, stipulated the contrary: although *some* defendants *sometimes* furnished information as to their last quotation, the plaintiff stipulated that at least eight of the defendants furnished price information *only* with respect to completed sales (F. 99 [App. 515], F. 135 [App. 521], F. 151(g) [App. 523-5], F. 212 [App. 539], F. 226 [App. 542], F. 242 [App. 544], F. 255 [App. 546], F. 293 [App. 552]). This stipulation, without quibble or reservation, precludes the speculation, offered by the plaintiff as a fact, that these defendants were communicating "the *current* price which the customer would have to pay in order to obtain containers from the defendant furnishing the information." (Br. p. 26) That a defendant sometimes requested information from a competitor when it "considered it necessary to ascertain the accuracy of a customer's report of another defendant's price" (*e.g.*, F. 289 [App. 552]) cannot erase from the record such a finding, for example, as the one that the "price information requested and/or furnished by Weyerhaeuser related to prices charged customers in actual sales," (F. 293 [App. 552]) or any of the similar findings concerning other defendants.

These are not instances where the district court made findings of fact on disputed evidence. The findings were stipulated by the plaintiff to be correct after the plaintiff was fully aware of all of the testimony and documents from which it now culls isolated words and phrases.

Why was price information requested or furnished by the defendants?

The reasons why price information was requested or furnished by the defendants on these infrequent occasions are also clearly established by stipulated facts and set forth in findings agreed to by the plaintiff. The contention that the requesting or furnishing of price information was grounded in a purpose to "stabilize prices" (Br. p. 30) is in irreconcilable conflict with these facts and findings.

It was stipulated that each defendant "requested price information from other defendants in order to aid it in making informed pricing and marketing decisions" (*e.g.*, F. 76 [App. 511]), and it was agreed that in order for a defendant "to compete effectively for the business of a purchaser, there is a vital need for information as to the price alternatives available to that purchaser" (F. 19(a) [App. 492-3]). To seek information in order to compete effectively is the very antithesis of a purpose to stabilize prices. The reasons underlying that need were likewise undisputed so there can be no disagreement as to the plain meaning of that concession:

1. "Every purchaser of corrugated containers had numerous alternate sources of supply, both actual and potential," and purchasers were "free to shift all or a part of their business from one supplier to another, and they frequently did so . . . on the basis of price" (F. 17 [App. 490], F. 28 [App. 496-7]).

2. Purchasers "had knowledge of prices which had been and were being offered by competing suppliers of corrugated containers" (F. 26 [App. 496]).

3. "Prices which purchasers of corrugated containers would pay were determined on the basis of

price alternatives available to them from existing and prospective suppliers," and "with minor exceptions . . . no manufacturer of such containers was able to obtain a higher price for such containers than the price at which another manufacturer had sold or offered to sell like containers to such purchaser" (F. 25 [App. 496], F. 28 [App. 497]).

4. "It was necessary for each supplier to meet or be below competition in order to retain its customers, and to meet or be below the prices and other terms offered by competitors in order to obtain new customers or additional business from existing customers" (F. 25 [App. 496]).

5. A defendant, as a supplier or prospective supplier of corrugated containers to a particular purchaser, had available to it only two sources of information as to price alternatives available to that purchaser, the customer or competing suppliers (F. 29 [App. 497]).

6. "On occasions, buyers furnish suppliers with incomplete, inaccurate, or misleading information as to prices offered by competing suppliers" (F. 30 [App. 497]).

The reasons for furnishing price information are, of course, entirely consistent with that same competitive purpose, as the "requesting" and the "furnishing" are like the head and the tail of the same coin. Some defendants gave price information upon request because it gave "an insight as to who was actively competing for a particular piece of business" (F. 124 [App. 519], F. 270 [App. 549]); other defendants furnished price information because they "believed" it was "unlikely" that they could obtain such

information when they needed it to compete unless they usually furnished it when requested (F. 151 [App. 523-5], F. 203 [App. 538], F. 215 [App. 540], F. 230 [App. 542-3], F. 296 [App. 553]), or they did so "hoping that such information would be given to it on those occasions when it might want such information" (F. 282 [App. 551]). These reasons all relate to the same underlying purpose—"to compete effectively."

How was price information used?

The facts concerning the use which was made of price information—an individual use—are also set forth in uncontested findings:

> 1. "In deciding whether to seek a particular order from a particular customer, or whether to offer to sell a particular container, and in determining the price to be charged or quoted, each defendant exercises its own business judgment. Many factors influence the decision, including, among others, the following:
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> • • •
>
> "(p) prices believed to have been most recently charged or quoted by competitors, when such defendant believes it has sufficient basis for such belief." (F. 22 [App. 494-5])
>
> 2. "In arriving at the price to be quoted or charged a particular purchaser for particular corrugated containers, each defendant took into account the price currently or most recently charged by it to that purchaser for the same or similar corrugated containers, the price alternatives available to the purchaser, its estimated manufacturing costs, desirability of such business, and the anticipated profit involved. • • •" (F. 50 [App. 504])

3. "In all instances, the determination as to the price to be charged or quoted by . . . [each defendant] was its individual decision. In deciding whether to seek a particular order from a particular customer, or whether to offer to sell a particular container, and in determining the price to be charged or quoted, . . . [each defendant] exercised its own business judgment." (F. 79 [App. 512], F. 92 [App. 514], F. 103 [App. 516], F. 112 [App. 517-8], F. 125 [App. 519-20], F. 142 [App. 522], F. 153 [App. 525], F. 174 [App. 530], F. 189(d) [App. 535-6], F. 205 [App. 538], F. 217 [App. 540-1], F. 233 [App. 543], F. 246 [App. 545], F. 258 [App. 546-7], F. 272 [App. 549], F. 298 [App. 553])

4. ". . . [Each defendant] requested price information from other defendants in order to aid it in making informed pricing and marketing decisions. Price information received by . . . [each defendant] from other defendants was taken into account and utilized by such company in individually determining the prices to be charged or quoted by it in the same manner, to the same extent, and with the same effect as price information which it usually and ordinarily received from purchasers, provided the price information received from purchasers was considered reliable." (F. 76 [App. 511], F. 91 [App. 514], F. 102 [App. 515-6], F. 110 [App. 517], F. 123 [App. 519], F. 141 [App. 522], F. 151 [App. 523-5], F. 169 [App. 529], F. 189 (b) [App. 535-6], F. 202 [App. 538], F. 214 [App. 540], F. 229 [App. 542], F. 244 [App. 545], F. 256 [App. 546], F. 268 [App. 548], F. 281 [App. 550-1], F. 295 [App. 553])

What was the effect of the communication of price information upon price competition?

Here too the record is replete with undisputed facts which preclude any inference of an adverse effect upon price competition.

This industry was highly competitive and characterized by unrestricted price competition (F. 16 [App. 490], F. 19 [App. 492-3], 273 F. Supp. p. 61 [App. 570-1]). Each defendant sought additional business by cutting prices other defendants had charged or quoted (F. 19(g) [App. 493]). Each defendant repeatedly lost customers and obtained new ones and continuously had losses and gains in its sales to particular customers, all by reason of vigorous price competition (F. 17 [App. 490], DX-6 pp. 21-4 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III pp. 21-4]).

Purchasers usually informed suppliers and prospective suppliers as to prices most recently charged or quoted by competing suppliers and identified the particular supplier or suppliers charging or quoting such prices (F. 19(b) [App. 493]). Absent price information, a supplier or prospective supplier often quoted prices higher than those charged or quoted by other suppliers (F. 19(e) [App. 493]). Upon obtaining such price information suppliers and prospective suppliers often reduced their prices (F. 19(d) [App. 493]). At all times each defendant was free to cut the price of a competitor (F. 37 [App. 499]). In all instances the determination as to the price to be charged or quoted was the individual decision of each defendant (*e.g.*, F. 79 [App. 512]).

4. *The Plaintiff's Factual Arguments*

We can now revert to the plaintiff's predicate to its statement of the questions presented, which is that from the past price information obtained from a competitor, a defendant "can determine the price his competitor is ask-

ing." (Br. p. 2) As set forth above, the only common denominator among the defendants is that the information given was the price at which the last completed sale had been made. Although some of the defendants occasionally disclosed instead the last offer made to a customer, rather than the last completed sale, this case would in any event have to be dismissed against at least half of the defendants if the plaintiff were to rely upon that occasional conduct of the others.

Moreover, the district court found, on undisputed and indisputable evidence, that neither the last price nor the last offer provided the basis for a reliable prediction of what a company would charge the next time (F. 22 [App. 494-5], F. 23 [App. 495-6]). The plaintiff's argument holds up only if no competitor ever changed its price, and of course, the facts are to the contrary. While the plaintiff iterates and reiterates one sentence from the stipulations to the effect that a supplier "usually" charged its customer the same price as on its last previous sale, it is really quoting out of context,* eliding the fact that the last previous price was not used on future orders whenever any one of a list of factors which influence pricing decisions had changed, and this list includes every conceivable reason for changing a price.

That a supplier usually charged his customer the same price as on a prior order was not the result of giving or

* The district court's finding reads: "A defendant regularly supplying a customer with corrugated containers, when pricing an order from that customer for additional corrugated containers of the same or different specifications, would usually price such additional containers on the same basis used by it in pricing that customer's last previous order. The foregoing was subject to change when (1) there had been a change in any of the competitive or other market factors or conditions; (2) the specifications and volume requirements were not substantially the same; or (3) there had been a change in raw material costs or other significant costs." (F. 23 [App. 495-6])

receiving price information as the plaintiff repeatedly suggests. Assuming first that there had been no change in any of the circumstances referred to above, the same price was "usually" charged only in the absence of the report of a competitor's lower price. In fact, competitive conditions were constantly changing, and price trends were never level, but always up and down (*see* DX-6, pp. 25-46 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III pp. 25-46]), raw material and other significant costs were not constant for any period of time (DX-5, pp. 1-6 [Tr. Jan. 27, 1966 p. 227] [App. 1014-9]), and there was continuous price cutting (DX-6, pp. 21-4 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III pp. 21-4]). Moreover, even if one supplier could assume that in certain circumstances its competitor would initially seek to charge a customer the same price as charged on the previous sale, it made no difference for both that supplier and each of its competitors were completely free to meet or beat that price as it saw fit in its individual judgment.

Most important, however, is that, even if it be assumed, as a purely hypothetical matter, contrary to the facts, that the receipt of the price information involved here enabled one to assume with certainty what his competitor would initially seek to charge, the legal issue would remain the same: whether the mere receipt of such price information without agreement to charge that price or any agreement whatever as to the use to be made of the information, with each price individually determined, and without any proof of any restrictive effect, is *per se* unlawful.

(a) The structure of the corrugated container market in the Southeast United States

Bowing to accepted economic theory, the plaintiff acknowledges that in a "perfectly competitive" market, full knowledge of current price information may facilitate the setting of a "truly competitive price." (Br. pp. 27-8) To escape from the obvious conclusion which appli-

cation of that principle to the facts in this case compels, the plaintiff attempts to picture the market as "dominated by relatively few sellers" and therefore one in which knowledge should be considered illegal without proof* (Br. p. 28).

There were not "relatively few," but fifty-one sellers in the market (F. 9 [App. 487]). It took eighteen to account for 90% of sales and, although not every one competed for the business of every customer, it was stipulated that each purchaser had "numerous" alternative sources of supply, both actual and potential (F. 8 [App. 487], F. 17 [App. 490], *e.g.*, F. 18 [App. 491-2]).

The Department of Justice recently issued merger guidelines, and it defined a "highly concentrated market" as one where the four largest firms have 75% or more of the market (Dept. of Justice Release dated May 30, 1968).

In the Southeast, annual sales of corrugated containers were over $188,000,000 per year. The four largest companies had about 45% of the total, and the shares of other defendants were as low as ¼%, without any evidence of dominance by any company or group of companies (Par. 6, Ex. I, PX-1 [Tr. Jan. 26, 1966 p. 104] [App. 927-8]). This is not a concentrated market permitting disregard of the fact that competition works best when it is informed.**

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* How the plaintiff can make the concession that at least *sometimes* the conduct here in issue is not unlawful, and yet argue for a *per se* rule of illegality which would dispense with proof of effect in this or any other case, is never explained.

How the plaintiff can stipulate that price information is "vital" to effective competition and at the same time claim that receiving it is a *per se* violation of the Sherman Act whenever it comes from the lips of a competitor even though it is used in exactly the same way as when received from a customer, is also left without explanation.

** The only available published statistics, derived from census data, show that there was no trend toward concentration in the corrugated container industry nationally from 1950 to 1958:

(continued on following page)

There is no evidence, or even a suggestion, that the buyers were ever in any inferior bargaining position vis-a-vis the sellers. The evidence is the other way around.

Nor are there the requisite indicia of market power in any "in" supplier group. The plaintiff concedes that entry is inexpensive, and that in fact the number of competitors has increased at a rapid rate (F. 9 [App. 487], F. 11 [App. 488-9]). There is no reason to consider this as other than a fully competitive market, except that for the plaintiff to face up to this would be to concede that there is not even a theoretical legal or economic reason to challenge the conduct of the defendants, particularly as the plaintiff does not disagree with the findings below that this market is highly competitive and characterized by vigorous price competition.

Plaintiff argues also that the demand in this industry is highly inelastic, leaving no option to the buyer to "withdraw from the market if the price is too high" or to obtain "an attractively low price" (Br. p. 28) through an increase in his volume. But so long as the purchaser has numerous alternate sources of supply, both actual and potential, he has a clear and ever present opportunity to withdraw from

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Per cent of value of shipments accounted for by—

	4 largest companies	*8 largest companies*	*20 largest companies*
1950	24%	35%	51%
1954	23	37	56
1958	21	36	55

Sources: 1950: FTC, Report on Industrial Concentration and Product Diversification in the 1,000 Largest Manufacturing Companies: 1950, at 182 (1957); 1954: Senate Subcommittee on Antitrust and Monopoly, Report on Concentration in American Industry, 85th Cong., 1st Sess. 48 (1957); 1958: Bureau of the Census, Report to the Subcommittee on Antitrust and Monopoly on Concentration Ratios in Manufacturing Industry: 1958, at 127 (1962).

one supplier and increase his volume to another to obtain a price advantage—and this was done continuously (F. 17 [App. 490]).

Plaintiff argues in the abstract that "maintenance of some measure of uncertainty as to competitors' prices for specific orders is essential to insure that individual pricing decisions will result in the setting of a *truly competitive price.*" (Br. pp. 29-30) (emphasis added). But plaintiff's assumption that a *truly competitive price* will result only when the supplier is required to determine his price without information as to what prices are available from competitors ignores the agreed findings that in this market, absent price information, a supplier or prospective supplier often quoted prices higher than those charged or quoted by competitors and that in order to compete effectively there is a vital need for information as to the available price alternatives (F. 19(a) [App. 493], F. 19(e) [App. 493]).

Plaintiff's assumption that knowledge of the buyer's price alternatives lessens the *incentive* of the supplier to reduce prices is equally at war with the agreed findings. Although purchasers do not generally change suppliers unless offered a lower price by another supplier, each defendant annually experienced the loss of large numbers of customers and of particular orders to other customers, as well as substantial gains both in new customers and in sales to retained customers (F. 17 [App. 490]). There was a continuous downtrend in prices while there were increases in the prices of other commodities and in costs of manufacture of corrugated containers (DX-6, p. 1 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III p. 1]) (F. 15 [App. 489-90]). Plaintiff's attempt to depict this as a market in which there was no incentive to reduce prices is thus utterly unrealistic.

(b) The proof as to the purpose of each defendant in occasionally giving or requesting price information

When it comes to discussing purpose, the plaintiff has similar trouble with the facts. The brief seizes on isolated words and phrases in the deposition testimony of a few employees of some of the defendants.* These witnesses were deposed by the plaintiff but they were not cross-examined on the issue of purpose because, after their direct examinations, the plaintiff stipulated what the purpose was. The plaintiff stipulated before the conclusion of the depositions that "each defendant considered the price which [a] purchaser had most recently been charged or quoted for corrugated containers to be pertinent marketing

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* For example, plaintiff claims that a witness "testified that without price information from competitors it was impossible for him to raise prices without losing customers." (Br. p. 31) Not only does plaintiff misread the witness' testimony but in the process it completely ignores the finding of fact based on that testimony, to which it fully agreed. That finding is:

> "187. In the fall of 1961, Mead attempted to accomplish a general increase in its corrugated container prices. Several competitors also attempted to raise their prices at about the same time. Customers were not a dependable source of information as to the prices offered by competing suppliers. Without accurate market price information, when a customer stated that other corrugated box manufacturers had not increased their prices, Mead's sales personnel could either increase Mead's price as instructed and take the chance of losing the account, or keep the price at a level which the customer claimed he was getting from other suppliers and be sure to keep the account. Mead continued to lose position with its customers and it got to be an untenable situation. Mead thereafter temporarily relaxed, to a limited extent, as described in Finding 186, its previous prohibition against requesting and furnishing price information from or to competitors, in order to permit Mead employees to seek information as to market price levels in accounts for which Mead was competing." [App. 534-5]

Thus this is really an example of a supplier pricing itself out of the market and thus being unable to compete effectively in the absence of accurate market information.

information and considered it beneficial to have such information" (Par. 11, Ex. I, PX-1 [Tr. Jan. 26, 1966 p. 104] [App. 930]; F. 27 [App. 496]); and that it is "necessary for each supplier to meet or be below competition in order to retain its customers . . . [or] to obtain new customers or additional business from existing customers." (Par. 12, Ex. I, DX-1 [Tr. Jan. 27, 1966 p. 227] [App. 960]; F. 25 [App. 496])

Furthermore, after trial, the plaintiff specifically agreed to a proposed finding as to each defendant that it "requested price information from other defendants *in order to* aid it in making informed pricing and marketing decisions." (*e.g.*, F. 76 [App. 511], D.P.F. A-12 [App. 89-90]) (emphasis added)

Thus, the purpose of each defendant, as agreed by the plaintiff, was to obtain aid in making its own individual pricing and marketing decisions, determined in the exercise of its own business judgment, taking into account many factors other than competitors' prices. The plaintiff cannot now tenably urge a different purpose.*

(c) The proof as to the effect of price communication upon price competition

The plaintiff's approach to the question of effect is illuminated by its argument that defendants' evidence "cannot disprove Plaintiff's critical contentions." (Post-Trial Brief, p. 22) In other words, the plaintiff took the position below that, having presented an academic theory that knowledge necessarily restricts competition, the burden was on the defendants to disprove the theory, and that such disproof could not be in the form of evidence but would also

* Plaintiff's statement that the defendants have not suggested any reason for the requesting of price information other than "chilling the vigor of price competition" (Br. p. 32) reveals its need to disregard facts inconsistent with its theoretical arguments.

have to be in the form of theory which assumed the plaintiff's assertions even though they were contrary to the facts.

Thus, the plaintiff claimed that a defendant, learning from a competitor what its last price had been to a particular customer, competes less vigorously for that customer. The plaintiff made no attempt to support its theory by evidence but insists that this is the natural effect of knowledge on pricing behavior. The defendants, however, met the plaintiff's theory with concrete evidence that a defendant acted in exactly the same way whether it received such price information from a competitor or, as was much more usual, from the customer himself.

Defendants undertook to prove a negative, *i.e.*, that price competition was not restricted and not tempered. Of course, considering that the defendants in the aggregate must have quoted a million prices to the 10,000 purchasers of corrugated containers over the eight years of the alleged conspiracy, it was impossible to prove the negative with evidence as to each transaction. However, the defendants' unchallenged evidence was sufficiently compelling to leave no margin for doubt.

The evidence shows that a very large percentage of all purchasers of corrugated containers in the Southeast changed suppliers during a typical year because a new supplier cut the previous supplier's price (F. 17 [App. 490]). This is so inconsistent with an asserted agreement to restrict price competition that the plaintiff's theory cannot survive, particularly in the absence of any contrary proof, and the plaintiff could not prove even a single instance, in a million transactions, where a defendant tempered its price

competition as a result of the requesting or furnishing of price information.

The defendants took into account the possibility that an agreement to restrict price competition might be inferred if the prices of the various defendants were uniform or price movements were parallel as among the defendants. The defendants' evidence, stipulated by the plaintiff to be correct, proved exactly the contrary, and the district court found (and the plaintiff does not attack this finding) that the defendants' evidence demonstrated the absence of any general uniformity, harmony, stability, or parallelism in prices, and that price trends varied widely among the several defendants both as to direction and as to degree (F. 21 [App. 494]).

Addressing the possibility that the plaintiff would attempt to draw some inference of restricted price competition if price levels during the period of the alleged conspiracy were generally increasing in relation to prices of other commodities, the defendants adduced evidence on that score too. As a result, the plaintiff conceded and the district court found that the trend of corrugated container prices during the period of the alleged conspiracy was downward, while the defendants' costs and price levels of other commodities generally were rising (Par. 7, Ex. I, DX-1 [Tr. Jan. 27, 1966 p. 227] [App. 958-9]; F. 15 [App. 489-91]).

The plaintiff now asks this Court, as it asked the district court, to assume that the facts were as the plaintiff imagines, rather than as the evidence proves, and to find as a purely theoretical conclusion that price competition was actually restricted.

SUMMARY OF ARGUMENT

The stipulations of the plaintiff and the other evidence irrefutably prove that there was no agreement or combination to exchange price information, and therefore the plaintiff's first question on appeal must be answered in the negative.

As the district court found, relying upon stipulated facts and agreed findings: Each defendant was at all times free to request or furnish, or not request or furnish, information to another defendant as to prices for corrugated containers, and whether to request or furnish such information was the individual decision of each defendant (F. 28 [App. 496-7]). The extent and frequency with which such information was requested or furnished varied among the defendants, and the information was not always furnished (F. 32 [App. 498], *e.g.*, F. 239 [App. 544]). There was also lack of uniformity in the substance and scope of the information when furnished (273 F. Supp. at 59 [App. 566]). The district court properly found, on these facts, that there was no agreement that any defendant would furnish price information on request (F. 33 [App. 498]). It is no substitute that, occasionally, each defendant did so, but without being bound by agreement to do so.

Moreover, the plaintiff conceded below that even if it proved an agreement to furnish price information on request, its complaint would have to be dismissed because such an agreement is not itself illegal (Transcript of Conference with Attorneys, December 20, 1965, p. 46 [App. 34]). The plaintiff clearly understood then that such an agreement would not constitute a restraint of trade in the absence of a concert of action as to the use to be made of that information, limiting the freedom of the defendants individually to determine the prices of their product.

Thus, the district court had no need to reach the plaintiff's second question, whether the alleged agreement had the effect of restraining price competition. Nevertheless, the district court did make extensive findings on the question whether there was any restriction of price competition, and these findings are unassailable here since they are based on stipulated facts and there is no evidence to the contrary. It was found that there was no restraint on price competition, and the plaintiff concedes that no defendant, to any extent or in any manner whatsoever, surrendered its freedom to make every pricing decision independently and in the exercise of its own business judgment and in its own best interest, taking into consideration all of the factors which an independent seller would consider relevant (F. 22 [App. 494-5], F. 28 [App. 496-7]).

The plaintiff would now repudiate its concession below that an agreement to exchange price information, standing alone, is not unlawful; it argues in this Court that an agreement to exchange price information, without more, is a *per se* violation of the Sherman Act and thus can never be justified. It has been forced to that position because the evidence is overwhelming that in fact there was no restriction of price or other competition. The plaintiff is driven to argue that as a theoretical matter such restriction should be inferred even though the facts establish the contrary.

The plaintiff argues here that it may offer no evidence of its own and disregard all the defendants' evidence, and instead rely upon asserted inferences of fact and allegedly logical conclusions from such inferences. However, inferences and conclusions are no help when the premises upon which they are based are not only unsup-

ported, but directly contradicted, by the evidence, the stipulations of the plaintiff at trial, and the findings of the district court.

In the absence of any evidence of any restriction on competition, and in the face of agreed facts establishing that there was no such restriction, there is no basis for plaintiff to ask this Court to decide that the conduct in question has such a pernicious effect and is so devoid of redeeming qualities that it should be added to the list of *per se* violations of the Sherman Act.

We agree with the plaintiff that an informed pricing decision might well be different from an uninformed one. We differ with the plaintiff when it claims that it is *per se* illegal to obtain from a competitor information vital to effective competition which is used only as an aid in making intelligent individual pricing decisions, and that is the only issue on this appeal.

ARGUMENT

The requesting by a supplier from another supplier of the latter's most recent price for a specific product and the giving of such information upon request without any agreement or concert of action with respect to the price to be charged or quoted that customer by either of them, where in all instances the determination as to the price to be charged or quoted was each supplier's individual decision, does not constitute a contract, combination, or conspiracy in restraint of trade or commerce proscribed by Section 1 of the Sherman Act.

A. *There was no agreement to exchange price information*

This case was tried on the flat concession by plaintiff's counsel in open court that:

> "If the Government had charged in its complaint that the parties had agreed to exchange price information, period, it would have no case; the complaint would be subject to dismissal." (Transcript of Conference with Attorneys, December 20, 1965, p. 46 [App. 34])

Thus the question whether there was an agreement to exchange* price information is of only negative significance, although the concession quite naturally influenced

* The word "exchange" was defined for purposes of this case during the depositions (CX-4, pp. A-136 [App. 613-4], A-158 [App. 623], A-175 [App. 600] [Tr. Jan. 26, 1966 p. 138]) to mean "that the witness had either given past market information or received past market information from a competitor." Plaintiff acknowledged this definition in its district court brief (p. 6, n. 1) [App. 587], but plaintiff nevertheless uses, obviously for semantic advantage, the term "exchanging prices" throughout its brief in this Court to describe the furnishing of price information on request. This artificial usage must constantly be kept in mind. The evidence is clear that the party requesting price information did not, in exchange for the information received, state its own price to that customer.

the defendants' willingness to dispense with detailed trial testimony on that score. In any event, the record precludes the making of any inference that there was any agreement or combination. The findings on this score are supported by the stipulated testimony of each officer or employee of each defendant responsible for pricing that it was his individual decision whether or not to request or furnish price information (Par. 17(c), Ex. I, DX-1 [Tr. Jan. 27, 1966 p. 227] [App. 962-3], F. 35 [App. 498]), as well as by the concession that there is no evidence that any employee of any defendant ever discussed with any employee of another defendant the desirability of furnishing price information, or the fact that price information had been or was being communicated, or the frequency of such communication, or the requesting or failing to request such information, or the method of communicating, or the action to be taken or not to be taken with respect to any information (D.P.F. 40 [App. 74], F. 34 [App. 498]).

Defendants do not quarrel with the familiar cases which the plaintiff cites to the effect that it need not prove an express agreement. Defendants contend that the evidence of retention of freedom and individual action is so overwhelming as to preclude any inference of agreement.*

* Plaintiff would argue that this stipulated freedom "was merely the freedom to withdraw from the combination whenever a defendant concluded that the benefit of receiving information no longer outweighed the detriment of giving it." (Br. p. 22) This patent attempt by plaintiff to lift itself by its bootstraps is not worthy of serious consideration. Obviously a supplier is not free at all times to make an individual decision if such freedom is dependent upon withdrawal from a prior combination or conspiracy, and the district court's findings cannot be explained away in this manner. Before a withdrawal can take place, there must be an existing combination, and since the district court found no such combination it cannot be claimed that the district court intended so strained a construction of its findings, or that plaintiff so intended at the time it entered into the stipulation.

Here the plaintiff relies solely upon the fact that each of the defendants upon occasion gave or received price information as proof that each did it pursuant to agreement. No case that we know of has ever held that from such evidence alone a Sherman Act agreement, combination or conspiracy can be inferred.

B. *An agreement to exchange price information, without any agreement for concerted use of such information, would not be a violation of the Sherman Act*

But even assuming, arguendo, that it could be inferred that the actions of the defendants in occasionally giving or receiving price information were pursuant to agreement, what the plaintiff undertook to prove, and failed to prove, was necessarily something more. The plaintiff, before trial and consistently with the concession quoted above, stipulated:

> "The plaintiff does not contend that the facts contained in the record to be submitted as the plaintiff's affirmative case evidence an express agreement to exchange price information or to restrict competition. However, the plaintiff contends that from the facts contained in such record the Court may infer an agreement to exchange information as to the most recent quoted price for corrugated containers and that from such agreement, together with such facts, the Court may infer an agreement to restrict competition." (DX-1, p. 3 [Tr. Jan. 27, 1966 p. 227] [App. 952-3])

The plaintiff did not, however, offer any proof of any agreement as to the use which would be made of the price information received from a competitor. (Indeed, in an elaborate footnote attempting to explain away its concession that an agreement merely to exchange price in-

formation would not be unlawful, the plaintiff claims that the court below was wrong in stating that the plaintiff had undertaken the burden of proving an agreement to use such information for the purpose or with the effect of restricting price competition. (Br. pp. 16-17) Nor did the plaintiff offer any proof that competition was in fact restricted, claiming instead that, even in the face of contrary evidence, it must be assumed that the "necessary" effect of knowledge as to prices is to restrict competition (Br. pp. 27, 28).

It is here that issue is joined, for the plaintiff misreads this Court's decisions, none of which has ever held that the mere giving or receiving of price information without proof of concert as to the use of that information or proof of an actual restrictive effect upon price competition is unlawful. The plaintiff is thus seeking a new *per se* rule of law previously denied to it.

1. The Case Law

In the two cases involving price communication between competitors upon which the plaintiff relies, *American Column & Lumber Co.* v. *United States,* 257 U.S. 377, and *United States* v. *American Linseed Oil Co.,* 262 U.S. 371, an exchange of price information was held to be unlawful because it was a part of an overall agreement to fix or tamper with prices. These holdings were based upon persuasive evidence of agreements that took away freedom of action. In *American Column & Lumber,* the Court said:

> "Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the dis-

> cretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a 'harmonized' estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied. . . ." (257 U.S. at 410)

The evidence in *American Column & Lumber* was that the formal "Plan" adopted there required each member to make six reports to the Secretary: a daily report on sales, a daily shipping record, a monthly production report, a monthly stock report, a report of price lists and all changes in them, and inspection reports as to the grades of stocks on hand. Each was a detailed report and moreover, each of these reports was "subject to complete audit by representatives of the association." Punishment was provided for non-compliance (257 U.S. at 394-5).

None of these factors is present in this case. There was no "Plan" and no compulsion to give or receive price information. Defendants did not audit each other's books and records or have any access to the "minutest," or, for that matter, any other business details of their rivals. No fines or penalties were assessed for a failure or refusal to furnish price information, or for furnishing of inaccurate, incomplete or misleading information, or most importantly, for failure to adhere to the prices requested or received. There was no policing by the defendants.

In *United States* v. *American Linseed Oil Company*, 262 U.S. 371, the other case relied upon by plaintiff, the Court similarly found and condemned an agreement because it deprived the parties of their freedom of action in making

pricing decisions. In that case the twelve corporate defendants, who manufactured, sold and distributed linseed oil, had agreed among themselves to exchange on a daily basis, in a detailed and systematic fashion, full particulars about their respective businesses. As in *American Column & Lumber,* all reports were subject to full audit. The Court found that there was an agreement by the participating companies to adhere to published prices and to report immediately the details of any deviations. Furthermore, failure to comply with any of the agreed requirements resulted in forfeitures of money deposited and penalties, and an extensive policing apparatus was established. Upon this record, the Court stated:

> "The record discloses that defendants, large manufacturers and distributors—powerful factors in the trade—of commodities restricted by limited supplies of raw material (linseed), located at widely separated points and theretofore conducting independent enterprises along customary lines, *suddenly became parties to an agreement which took away their freedom of action* by requiring each to reveal to all the intimate details of its affairs. All subjected themselves to an autocratic Bureau, which became organizer and general manager, paid it large fees and deposited funds to insure their obedience. *Each subscriber agreed to furnish a schedule of prices and terms and adhere thereto*—unless more onerous ones were obtained—until prepared to give immediate notice of departure therefrom for relay by the Bureau. Each also *agreed, under penalty of fine,* to attend a monthly meeting and report upon matters of interest to be there discussed; to comply with all reasonable requirements of the Bureau; and to divulge no secrets." (262 U.S. at 389) (emphasis added)

In our case we have no agreement, no "autocratic Bureau," no "organizer" or "general manager," no "large fees or deposited funds" to insure obedience, no fines, no promises "to divulge no secrets." And, most important, there is no proof that any defendant here ever agreed to "adhere" to any furnished price or ever entered into any arrangement that took away its freedom of action. The contrary is stipulated (Par. 70, Ex. I, PX-1 [Tr. Jan. 26, 1966 p. 104] [App. 948]; F. 28 [App. 496-7]).

With respect to the effect upon competition of the challenged practices in *American Column & Lumber* and *Linseed Oil*, on the one hand, and in the present action, on the other, two entirely divergent fact patterns emerge. In *American Column & Lumber* the record revealed that the prices increased to an unprecedented extent (as much as 343%), and the Court found that the united action of the defendants "contributed greatly to this extraordinary price increase" (257 U.S. at 409). Similarly, in *Linseed Oil* the Supreme Court found that "the prices of oil became more stable" (262 U.S. at 387) after each defendant agreed to furnish a schedule of prices and adhere thereto. On the other hand, in the case at bar the uncontradicted evidence establishes widely fluctuating prices for corrugated containers, a highly competitive industry, and sharp variations among competitors in prices quoted and charged, as well as a downward trend in prices despite rising costs of manufacture (F. 15 [App. 489-90], F. 21 [App. 494]).

Thus, in neither of the cases relied upon by plaintiff was there any doubt that there was an express agreement to exchange price information, that it was merely part of a further agreement as to the use to be made of that information, and that production and price competition were in fact, not in theory, restricted. The plaintiff is plainly wrong

in asserting that these two cases "recognized the unlawful tendency toward restraint in price competition" of knowledge as to prices and "recognized the necessary effect of such knowledge" was "suppression of competition." To the contrary, in neither case was any *per se* rule invoked; it was not presumed that competition had been restrained; rather the plaintiff offered proof of an actual restraint upon competition, of an actual effect upon price, which it has been unable to do in this case.

Any doubt as to the proper construction of those cases is dispelled by reference to the later cases in this Court involving price communication, in which the plaintiff expressly sought and was expressly denied a rule of *per se* illegality based upon the alleged "natural tendency" of knowledge to restrict price competition.

In *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U.S. 563, the Court upheld an agreement for extensive exchange of market information by 22 corporate competitors producing 70% of the maple, birch and beech flooring because it found no agreement or concerted action with respect to the use to be made of the information exchanged.

In *Maple Flooring* the Association digested and reported to all participants information contained in weekly summaries filed with it by each member showing dates of sales, quantity of shipments, types and grade of products, delivery details, prices, average freight expenses and rates of commission. Additionally, monthly reports were filed on volumes of production, new orders booked, inventory, and the number of orders unfilled. The Court rejected the plaintiff's contention that the statistical gathering and dissemination of the Association was so

extensive that each participating company knew the exact condition of the business of every other member and therefore concerted action must necessarily have resulted.

The plaintiff's argument that the extent of the communication among the defendants was inherently anticompetitive, the very same argument upon which the plaintiff relies here, was disposed of as follows:

> "We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information, such as is here complained of, bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses; nor do we think that the proper application of the principles of decision of *Eastern States Retail Lumber Association* v. *United States* or *American Column & Lumber Co.* v. *United States* or *United States* v. *American Linseed Oil Company* leads to any such result. The court held that the defendants in those cases were engaged in conspiracies against interstate trade and commerce because it was found that the character of the information which had been gathered *and the use which was made of it* led irresistibly to the conclusion that they *had resulted,* or would necessarily result, *in a concerted effort of the defendants to curtail production or raise prices* of commodities shipped in interstate commerce. The unlawfulness of the combination arose not from the fact that the defendants had effected a combination to gather and disseminate information, but from the fact that *the court inferred from the peculiar circumstances of each case* that concerted action had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices.
>
> "Viewed in this light, can it be said in the present case, that the character of the information gathered

by the defendants, or the use which is being made of it, leads to any necessary inference that the defendants either have made or will make any different or other use of it than would normally be made if like statistics were published in a trade journal or were published by the Department of Commerce, to which all the gathered statistics are made available? The cost of production, prompt information as to the cost of transportation, are legitimate subjects of enquiry and knowledge in any industry. So likewise is the production of the commodity in that industry, the aggregate surplus stock, and the prices at which the commodity has actually been sold in the usual course of business." (268 U.S. at 584-85) (emphasis added)

Clearly, in this case, where there was far less frequency of communication, where plaintiff admits that it was impossible for it to find any evidence that the communications restricted price competition, and where the evidence established that price competition was not restricted, plaintiff's challenge to defendants' conduct must also fail.

The Court in *Maple Flooring* clearly set forth the rule applicable here—the burden of which the plaintiff expressly refuses to accept—that it is not an agreement to exchange price information, but rather an agreement for concerted action with respect to the use of that information, which is to be condemned:

"We realize that such information, gathered and disseminated among the members of a trade or business, may be the basis of agreement or concerted action to lessen production arbitrarily or to raise prices beyond the levels of production and price which would prevail if no such agreement or concerted action ensued and those engaged in commerce were left free to base individual initiative on full information of the essential elements of their business. . . . But in the absence of

> proof of such agreement or concerted action having been actually reached or actually attempted, under the present plan of operation of defendants we can find no basis in the gathering and dissemination of such information by them or in their activities under their present organization for the inference that such concerted action will necessarily result within the rule laid down in those cases." (268 U.S. at 585-86)

Maple Flooring thus did not turn upon the specificity of the price information involved as plaintiff suggests but upon the lack of agreement as to the use to be made of it and upon the retention by the defendants of freedom to act individually.

Again in *Cement Manufacturers Protective Assn.* v. *United States,* 268 U.S. 588, decided the same day as *Maple Flooring,* the Court upheld a program for the exchange of trade statistics, concluding that the evidence did not show that the arrangement had the purpose or effect of restraining trade. There too the plaintiff asserted that uniformity of prices was the natural and necessary result of the defendants' activities. As in our case it did not, however, prove any agreement setting or limiting prices. Commenting on the basic problem of the case the Court stated:

> "The two essential elements in the conspiracy to restrain commerce charged therefore are (a) the gathering and reporting of information which would enable individual members of the Association to avoid making deliveries of cement on specific job contracts which by the terms of the contracts they are not bound to deliver, and (b) the gathering of information as to production, price of cement sold on specific job contracts and transportation costs. . . .

"That a combination existed for the purpose of gathering and distributing these two classes of information is not denied. . . .

"[F]or reasons stated more at length in our opinion in *Maple Flooring Association* v. *United States, supra,* we cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned.

"Nor, for the reasons stated, can we regard the gathering and reporting of information, through the co-operation of the defendants in this case, with reference to production, price of cement in actual closed specific job contracts and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price.

"Agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful and may be enjoined, but the Government does not rely on any agreement or understanding for price maintenance. It relies rather upon the necessary leveling effect upon prices of knowledge disseminated among sellers as to some of the important factors which enter into price. It is conceded that there is a substantial uniformity of price of cement. Variations of price by one manufacturer are usually promptly followed by like variation throughout the trade.

* * * * *

"For reasons stated in *Maple Flooring Association* v. *United States, supra,* such activities are not in them-

selves unlawful restraints upon commerce and are not prohibited by the Sherman Act." (268 U.S. at 602-06)

The evidence here similarly establishes that the communication of price information was often for the purpose of verifying information obtained from customers (273 F. Supp. at 59 [App. 565-6]). More important, the rationale of *Cement Manufacturers* is applicable here as the evidence fails to show that price information obtained by any defendant from a competitor ever had any effect on prices except for its natural influence on individual action. And *Cement Manufacturers* also disposes of plaintiff's attempt to distinguish *Maple Flooring* on the ground that the price information involved in that case did not "identify buyer or seller" (Br. p. 39), for the price information in the *Cement* case did involve the "price of cement sold on specific job contracts" (268 U.S. at 602).

That the plaintiff is arguing for a new *per se* rule against the giving or receiving of price information regardless of the circumstances is explicitly conceded in a footnote discussing *Cement Manufacturers* where it concludes that the need for protection against fraudulent misrepresentations is not "a defense to an otherwise *per se* violation of the Sherman Act." * The heart of the plaintiff's argument on this score appears to be its proposition:

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* That the plaintiff necessarily contends for a *per se* rule outlawing the giving or receiving of price information in *all* circumstances is made clear when the evidence is examined as it relates to a single defendant. St. Joe was not a member of the Fibre Box Association (F. 61 [App. 507]). It attended no meetings with its competitors (F. 302-326 [App. 554-63]) (D.P.F., p. 115, agreed to by plaintiff [App. 168]). While St. Joe competed with all but three of the defendants (F. 221 [App. 541]), it gave to or received price information from but a few of them (F. 225 [App. 541-2])—and then only on infrequent occasions (F. 224 [App. 541]), by telephone (F. 227 [App. 542]),

> ". . . unlike the defendants in *Cement Manufacturers*, the defendants here have no legal right to such information [as to prices that had been offered by competitors] from customers unwilling to give it, nor do they have a legal right to base all pricing decisions on full knowledge of competitors' prices." (Br. p. 40)

Defendants here had as much "legal right" to information as did the defendants in *Cement Manufacturers* for the options granted there were "free," merely treated as binding by trade practice. Defendants here clearly had as much "legal right" to protect themselves from misrepresentation by their customers as did the defendants there.

In making this argument, the plaintiff, among other things, also overlooks the Robinson-Patman Act and the necessary effect on its argument for a broad *per se* rule of well recognized decisions under that Act. A price discrimination otherwise violative of Robinson-Patman can be justified by a showing on the part of the seller that his lower price was made in good faith to meet an equally low price of a competitor. The burden of making such a showing is, of course, on the seller and a heavy burden it is.

In *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 758, this Court upheld the Federal Trade Commission in a finding that the sellers had not sustained the burden of rebutting the prima facie case of price discrimination since

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and in terms of an end price charged in a past, closed transaction (F. 226 [App. 542]). The over 400 salesmen's call reports in evidence from St. Joe files (a representative sampling of thousands of similar reports) record the vigor of the price competition that existed between that company and the other defendants (including those with which, on infrequent occasion, it communicated a past price) for the business of specific customers (DX 620 to 1042 [Tr. Jan. 27, 1966 p. 227]).

> "... they had failed to show that their lower prices were 'made in good faith to meet an equally low price of a competitor.' The facts as stipulated were only that the discriminations were made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence, to the effect that in each case one or more competitors had granted or offered to grant like discriminations. It is stipulated that respondents, 'believing such report to be true, has then granted similar' price discriminations. The record contains no statements by the persons making these reports and *discloses no efforts by respondents to investigate or verify them,* and no evidence of respondents' knowledge of their informants' character and reliability." (emphasis added)

From *Staley* and the many cases which have followed it over the years, it is clear that sellers not only have a legal right but a duty at times to verify information as to prices which their customers claim have been offered to them by competitors.* The requirement of the Robinson-Patman Act that in appropriate circumstances a seller must verify a report of a price in order to establish that it was in good faith attempting to meet a competing seller's price demonstrates clearly that the mere fact of such price communication is not to be considered a *per se* violation of the Sherman Act.

The plaintiff's reliance upon *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, is equally misplaced. There, this Court struck down an exchange program under which each member was required *to adhere* to previously an-

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* The district court found (F. 29 [App. 497]) and plaintiff concedes (Br., p. 24 n.14) that defendants sought information from competitors only when reliable information was not available from their own records or from customers.

nounced prices. By industry agreement all prices were announced in advance of their effective dates; however, the Court found no illegality in the announcement of prices, but only in the requirement that each member adhere without deviation to the terms publicly announced. It held:

> "The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be." (297 U.S. at 601)

Accordingly, this Court modified the decree which had been entered below by striking out injunctive provisions which would have prohibited "systematically reporting to or among one another or competitors," whether directly or through a trade association, "information as to current or future prices" and "giving any prior notice of any change or contemplated change in prices . . . or relaying, reporting or announcing any such change in advance thereof." The Court said:

> "Such reporting or relaying, as we have said, permits voluntary price announcements by individual refiners, in accordance with trade usage, to be circulated, and subject to the restrictions imposed by the decree does not appear to involve any unreasonable restraint of competition." (297 U.S. at 603-04)

In the present case, of course, there was no agreement for adherence, undeviating or otherwise, to prices previously announced nor any of the other facts that led the Court in *Sugar Institute* to conclude that there was in that case, in addition to a lawful agreement to exchange price information, an unlawful agreement for joint use of such information.

2. The Consent Decree

It was doubtless upon the authority of these decisions that the plaintiff agreed to the entry of the 1940 Consent Decree in the corrugated container industry, with full knowledge of the operations of this industry. (DX-2 [Tr. Jan. 27, 1966 p. 227] [App. 1004-13]) Many of the defendants either are parties to or have become bound by that decree, and each knew of and relied upon it (F. 43 [App. 501]).

That decree provided in pertinent part that the parties remained free to "cooperate" in "gathering" and "disseminating" price information so long as they did so "without . . . reaching or attempting to reach any agreement or any concerted action with respect to prices." (F. 44 [App. 501-2]).

We submit that the plaintiff, in entering into the 1940 Consent Decree, could not have believed that requesting or furnishing price information was a *per se* violation of the antitrust laws and at the same time have so carefully carved such conduct out of the prohibitions of the decree and referred to a "right" to "cooperate" in this regard. While the plaintiff intended in the 1940 Consent Decree to lay down guidelines for positive "steps" and for an industry "course of conduct" which not only would redound to the public welfare, but which also would actively promote "free competition in an orderly market," at the

same time and in the same Consent Decree the plaintiff recognized that requesting or furnishing price information would not without more violate the antitrust laws (F. 41, F. 42 [App. 500-01]).

Whatever "natural effect" might flow from the furnishing or requesting of price information must have been anticipated at the time of entry of the Consent Decree, since "natural effect" had been previously discussed in this Court's decisions. A purpose to consider the information communicated in arriving at individual price decisions was inherent in the very process of furnishing or requesting it and had been held lawful so long as freedom of action is actually maintained.

Thus the very existence of the Consent Decree precludes the making of an inference of illegal purpose or of unlawful effect from the mere fact of giving or receiving price information. The Consent Decree is a close and binding precedent upon the legality of the requesting or furnishing of price information and an admission by the plaintiff of the legality of such conduct, and it has been relied upon and complied with in good faith by each of the defendants* (F. 43 [App. 501]).

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* The plaintiff only recently reaffirmed its recognition in the 1940 Consent Decree of the legality of the requesting or furnishing of price information here in issue. In *United States* v. *Union Bag-Camp Paper Corporation*, 1966 Trade Cas. ¶71,698 (S.D.N.Y.), a consent decree was entered on November 17, 1965, which enjoined agreements or combinations to communicate prices only if the price or quotation was communicated "in advance of its being disseminated to the trade or quoted to individual customers." There is certainly no evidence that any defendant in this case ever furnished either a price or a quotation in advance of its dissemination to the trade or an individual customer.

Disregarding this Court's decisions and repudiating the 1940 Consent Decree, plaintiff argues in its brief that this Court should now rule that the conduct of these corrugated container manufacturers in communicating price information amounts to a *per se* violation of the Sherman Act. No court has ever so held. In every case involving prices in which there has been a holding of *per se* illegality, this Court has found an agreement or combination or conspiracy to adhere to prices or to maintain prices or to use price information in a manner restrictive of competition, none of which is present here.*

Reference to *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, decided just two weeks after the 1940 Consent Decree, only serves to underscore this rule. The decision in *Socony* expressly recognized the basic distinc-

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* Cases subsequent to *Sugar Institute* have consistently held that unlawful agreements must encompass not only an exchange of information but a common purpose to employ such data in a concerted effort to insulate price levels from market pressures: *Salt Producers Association* v. *F.T.C.*, 134 F.2d 354, 359 (7th Cir. 1943) held that the exchange of price information was forbidden only when "integral with a scheme to restrict competition, and used as an instrumentality therefor"; *United States Maltsters Association* v. *F.T.C.*, 152 F.2d 161 (7th Cir. 1945); *Milk and Ice Cream Can Institute* v. *F.T.C.*, 152 F.2d 478 (7th Cir. 1946); in *Tag Manufacturers Institute* v. *F.T.C.*, 174 F.2d 452 (1st Cir. 1949), a plan pursuant to which producers reported both list prices and all off-list transactions was upheld where participants had made no agreement to abide by the reported prices; *Morton Salt Company* v. *United States*, 235 F.2d 573 (10th Cir. 1956); in *Plymouth Dealers' Association of Northern California* v. *United States*, 279 F.2d 128, 134 (9th Cir. 1960), the court noted that "the printing of a price list alone" would not constitute a Sherman Act violation since such a violation would require "the formulation and distribution of a schedule of prices with the *intent* of establishing list *prices* at higher levels than Plymouth factory suggested prices"; in *United States* v. *Union Bag-Camp Paper Corporation*, 1965 Trade Cas. ¶71,378 at 80,618 (S.D.N.Y.), the court noted that the *per se* rule

tion between the agreement to gather and distribute price information which *Maple Flooring* had held to be legal and the agreement to tamper with prices which it was condemning:

> "Nor are *Maple Flooring Mfrs. Assn.* v. *United States* and *Cement Mfrs. Protective Assn.* v. *United States, supra,* at all relevant to the problem at hand. For the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing. And they were decided, as indicated in the *Trenton Potteries* case on the express assumption that any agreement for price-fixing would have been illegal *per se.*" (310 U.S. at 217)

On the basis of a fair reading of all the prior cases, it seems clear that this Court has, despite several requests to rule to the contrary, consistently refused to hold that the communication of price information between competitors, absent any agreement to fix prices or to use such information to restrict competition, and with each competitor free to make—and actually making—its individual

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does not apply to mere communications of price information among competitors:

> "Furthermore, it has been held that the exchange and dissemination of trade information such as distribution costs and prices in actual sales of market commodities in the absence of a purpose to violate the antitrust laws is not unlawful *per se* and may even be salutary. See *Salt Producers Association* v. *Federal Trade Commission,* [1940-1943 TRADE CASES ¶ 56,261], 134 F.2d 354 (7th Cir. 1943); *Sugar Institute, Inc.* v. *United States* [1932-1939 TRADE CASES ¶ 55,107], 297 U. S. 553, 599 (1936); *Maple Flooring Ass'n* v. *United States,* 268 U. S. 563, 582 (1924)."

decision as to the price it will charge, is a *per se* violation of the Sherman Act.*

C. *The requesting or furnishing of price information should not be added to the list of per se violations on a record devoid of proof of market effect and economic consequences*

1. The decisions of this Court place a heavy burden of proof on plaintiff when it seeks a new rule of *per se* illegality

The question remains whether the plaintiff has established such a record in this case that this Court should now overrule its earlier decisions and extend the category of *per se* violations to include the conduct here in issue. Applying the teaching of *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, and *White Motor Co.* v. *United States*, 372 U.S. 253, the answer to that question depends upon whether the conduct involved has been shown by evidence to have such a "pernicious effect on competition" and so to "lack . . . any redeeming virtue" (356 U.S. at 5) that it is to be declared henceforth to be unlawful without inquiry as to purpose or effect. To decide that, however, the Court must know precisely what is "the actual impact of these arrangements on competition." (372 U.S. at 263) This Court observed in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 178, that:

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* The enduring vitality of the rule of *Maple Flooring* was recognized only three terms ago in *Joseph Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45, where a unanimous Court observed:

> "The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. *Maple Flooring Assn.* v. *United States*, 268 U.S. 563, 582-586; *cf.*, *American Column Co.* v. *United States*, 257 U.S. 377. . . ."

> "... the area of *per se* illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect and economic consequences."

We submit that the failure of the plaintiff to offer any evidence as to the effect upon competition, its insistence that it can rely upon the "natural tendency" argument previously rejected by this Court, and the uncontroverted evidence offered by defendants upon which the court below found that price competition was not restricted, do not provide a proper foundation for the pronouncement of a new rule of law which would so profoundly affect long standing business practices. Once this Court has announced that a practice is *per se* illegal, proof of effect may in all future cases be dispensed with; but in this case, in which the Court is being asked to reverse itself and to determine for all time for all industries that receipt of price information from a competitor necessarily restricts price competition, the plaintiff should not be permitted to substitute speculation for proof.

2. The plaintiff's "effects" argument is based upon speculation

The plaintiff should not be free to speculate as to the defendants' margin of profit on sales of corrugated containers (Br. p. 42 and p. 42 n. 26), when it agreed that prices of corrugated containers were generally declining while costs as well as prices of other commodities were rising (F. 15 [App. 489-90]), and the plaintiff never sought to establish that profits were nevertheless high enough to support an inference of restricted competition.

Nor should the plaintiff repeatedly suggest in its brief that some unnamed purchasers might have preferred

that potential new suppliers bid in ignorance of the past price paid to existing suppliers (*e.g.*, Br. p. 34). With the names of all 10,000 customers in the Southeast, the plaintiff did not find one to testify to that effect (F. 20 [App. 493-4]). Without adducing any evidence on a point which the plaintiff now argues is vital, can it now ask this Court to accept its speculation with respect to facts which, if true, would have been easy to prove?

Rather than offering proof, the plaintiff argued below, and argues here, that the obtaining of price information from competitors had the "necessary effect of either maintaining identical price quotations to particular customers or of minimizing the amount of price reductions." (Br. p. 27) The only basis advanced for the argument is the quite different stipulated fact—which should have surprised no one—that a defendant had to meet or beat the prices of competitors if it was to sell its containers (F. 25 [App. 496]), and the assumption that when a price was cut to the extent necessary to get the business, it was only a minimal reduction. Plaintiff's argument was rejected by the district court, however, not only because the assumption was unsupported by evidence, but because it was contradicted by the evidence of substantial price cuts, apparently intended to induce the customer not to offer its existing supplier an opportunity to meet the lower prices.

For example, the documentary evidence in this case* shows, with respect to one purchaser in North Carolina, as follows: Container Corporation quoted a price of $1,068

* Defendants submitted over 1000 documents, stipulated to be a sampling from their files, relating to hundreds of customers and thousands of transactions, which the district court relied upon in finding independent and unrestricted price competition in this industry (F. 19 [App. 492-3]).

plus $33 setup charge in early January 1960, but on January 13 it lowered its price to meet International's offer of $959 (DX-33 [Tr. Jan. 27, 1966 p. 227] [App. 176-9]). By March 1961, after Union-Camp had quoted $858, West Virginia (Hinde & Dauch) had quoted $850, Container Corporation had quoted $847 and Crown Zellerbach (Gaylord) had quoted $839, Carolina took the business at $801. At that point, the purchasing agent admitted that prices had "dropped to ridiculously low levels" and doubted "that Carolina Container would want repeat business at these prices" (DX-50 [Tr. Jan. 27, 1966 p. 227], [App. 188-9]).*

Of course knowledge as to price alternatives permitted each defendant to make its pricing decisions in the light of this admittedly pertinent market information. The decision in some instances was that the price was already so low that the business was regarded as undesirable, or that a moderate cutting of the competitor's price was warranted in the particular situation, or that the particular defendant should keep or take the business at whatever price reduction it believed necessary to accomplish that result. But the point is that each competitor made its decision individually in the light of its own individual interests.

Plaintiff has conceded that the obtaining of this same price information from sources other than a competitor—although it had the identical effect—did *not* involve a re-

* The inappropriateness of deciding important cases on the basis of asserted inferences is demonstrated when the plaintiff here asks the Court to infer *both* (1) that as a matter of its theory, the defendants must be presumed to have cut competitors' prices only minimally, *and* (2) that the evidence of large price reductions to meet or beat competition proves that prices were so high that they must have been tampered with. This well illustrates the wisdom of the rule that cases should be decided on evidence and not on partisan conjecture.

striction of price competition (Post-Trial Brief, p. 20). But a defendant's freedom of pricing decision was equally unrestrained on those less frequent occasions when price information was obtained from a competitor, for it was stipulated that each defendant in all instances made its own individual pricing decisions, irrespective of whether it obtained price information from a competitor, or from the customer, or from its own records of past sales or, for that matter, had no price information at all.

3. The plaintiff's theories are rebutted by the facts

Plaintiff's "effects" argument is also based on the untenable theory that a supplier is not competing if it meets a competitor's price, and does not cut the price as much as possible at every opportunity. Plaintiff asserts that if a defendant quotes the same price as a competitor, the customer will give him a share of the business at that price (Br. p. 4). That was not the evidence. The evidence was that most purchasers wanted more than one source of supply, and that some purchasers did not accept the offer of the manufacturer making the lowest initial quotation, but afforded other manufacturers an opportunity to meet such lower quotations, and if met, some purchasers *often* divided their purchases among *some* or all of the low quoting manufacturers (F. 24 [App. 496], F. 28 [App. 496-7]).

In addition, the defendants' evidence shows other patterns. When receiving more than one offer at different prices, the purchaser will offer the business to a high bidder only if he will offer a price as low or lower than the lowest bid originally received (F. 25 [App. 496]). Others will give all of a particular order to the lowest bidder and will not permit higher bidders to share the business at the same price (F. 28 [App. 496-7]).

In apparent recognition of the inadequacy of its broad theory to withstand the evidence to the contrary, the plaintiff seems to be limiting its argument to a single situation, to wit, when (i) a defendant decides to bid for the business of another defendant's customer, and (ii) the customer refuses to tell the prospective new bidder the price he most recently paid his current supplier. In that limited circumstance, the plaintiff argues, if a defendant asks the current supplier what its latest price was, the prospective supplier is in a position to meet that price or cut it only minimally, whereas otherwise it would be likely to quote an even lower price.

This theoretical argument fails to take into account the realities of the marketplace as set forth in the stipulated facts and the agreed findings.*

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* The real-life operation of one purchasing agent may be helpful in assessing plaintiff's hypothesis that a customer would ask for blind bids: in early 1961, Owens-Illinois was selling this customer a container for $979. In April 1961, the customer informed St. Joe that Owens-Illinois' price was $960 and that if St. Joe quoted a competitive price it would split the business. St. Joe met Owens-Illinois' reportedly lower price. Owens-Illinois then had to lower its price to $960 to be competitive.

In May 1961, the customer informed St. Joe that it had a price of $925 from Owens-Illinois, and informed Owens-Illinois that St. Joe and Southern had quoted $925. Owens-Illinois "met" the $925 price to keep the business, as did St. Joe.

In June 1961, St. Regis submitted a price of $882. When Owens-Illinois decided to meet St. Regis' price, it was told by the customer that St. Joe had cut the price to $773, which Owens-Illinois then met.

In July 1961, Container Corporation quoted $773 and Owens-Illinois quoted $770. St. Joe took the business at $770 with a guarantee of that price for the rest of the year.

In January 1962, St. Joe tried to increase its price to $847 but was told by the customer that Container Corporation had quoted $770 and guaranteed that price for all of 1962. By June 1962, the price had been cut by Tri-State to $760 (DX-250 [App. 326-7], 272 [App. 340-1], 283 [App. 352-3], 1000-08 [App. 1020-1] [Tr. Jan. 27, 1966 p. 227]).

How do you get a customer to take business from an established supplier and give it to you at the same price when customers generally will not change suppliers unless offered a lower price? Yet the evidence is that thousands of customers shift suppliers each year because they are offered lower prices by some other defendant. (F. 17 [App. 490], F. 18 [App. 491-2], DX-6 pp. 21-4 [Tr. Jan. 27, 1966 p. 227] [App. Vol. III pp. 21-4])

This evidence destroys the plaintiff's argument predicated on the mistaken assumption that a seller cannot anticipate the competitive advantage which would normally result from a lower price—a larger share of the available business.

The "effects" argument is based on the further misconception that any price a defendant quoted* "was subject to prompt discovery by any competitor upon request." (Br. p. 29) On the contrary, there is literally no evidence that with respect to a customer it had recently sold, any defendant ever asked for price information from a competitor unless the customer itself claimed that the competitor had a lower price and this claim was suspect as to its truth. If the customer received a lower price from a competitor (including a co-supplier to a customer with two or more suppliers) and kept this fact a secret, it would not be discovered by another defendant. The customer could maintain any "degree of uncertainty" it wished merely by not telling one of its suppliers that a co-supplier or a new supplier had quoted a lower price. The reason that the customer would usually reveal this information was that he expected that the high bidder would reduce its price to *or below* that of any competitor.

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* As noted above at page 11, at least eight defendants gave information as to prices only on completed sales.

In any event competition often takes the form of meeting the prices of competitors, and a highly competitive industry is one where prices respond promptly to changes in supply and demand and each supplier's price responds promptly to changes in its competitors' prices. "Meeting" thus does not connote stability. So long as pricing decisions are individually made by each defendant, and the initiation of price changes by each defendant remains unrestrained, the prices to any customer will be as unstable as the changing conditions of supply, demand and competition dictate. That was the condition in the corrugated container industry.

4. The plaintiff misreads the district court's opinion

The plaintiff also argues that the district court's decision on this issue was based on its allegedly erroneous holding that "'cooperative and reciprocal action between and among competitors for the purpose of stabilizing prices' is not illegal so long as the decision whether or what to bid on a particular order remains 'the individual decision of each defendant'" (Br. p. 27). The plaintiff's argument is then premised on the alleged holding that there had been "cooperative and reciprocal action between and among competitors for the purpose of stabilizing prices" (Br. p. 27). The premise is not supported by the district court's findings of fact; it is false, and so are the conclusions which would be derived from it.

The plaintiff has twisted the district court's statement *of the plaintiff's argument* so that it would read like a holding of the court itself. What the district court said, at the point cited in the plaintiff's brief, was:

> "Plaintiff does not challenge the right of the defendants to obtain and use reliable market information for the purpose of maximizing sales and profits, but *argues* that cooperative and reciprocal action between and among competitors for the purpose of stabilizing prices is to impose undue restraint upon free competition protected by the Sherman Act." (273 F. Supp. at 60 [App. 569]) (emphasis added)

The district court then pointed out that the argument did not take into account the fact, as stipulated by the plaintiff, that each defendant exercised its own business judgment, and made its own individual decision whether to quote higher, lower, or the same price; that there is no evidence that any defendant ever discussed with any other defendant the desirability, the frequency or the consequences of requesting or furnishing, or failing to request or furnish price information, or the action to be taken with respect to such information; and that the freedom of action concededly reserved by each defendant completely refutes the charge that it was the common purpose of the defendants to maintain prices which would be substantially identical with the prices of another, to minimize price reductions, or otherwise make concerted use of any price information after it had been obtained. (273 F. Supp. at 60-61 [App. 569-71])

The *holding* of the district court was very different from what the plaintiff here asserts: the district court held that obtaining price information is not illegal *merely* because it enables the recipient to compete on the basis of fuller market information, and that the plaintiff had proved nothing further.

The district court was clearly correct in holding that the plaintiff had failed to prove its charge that there had been an effect of maintaining substantially identical price quotations to specific customers, or minimizing the amount of price reductions to be offered to such customers. How could this have been established when the plaintiff did not offer proof of any price ever charged? The extensive findings on this score, summarized by the district court in its opinion (273 F. Supp. at 60-61 [App. 569-71]) are never disputed, and never explained away in plaintiff's brief.

5. Plaintiff's "economic" argument as to effect has no record foundation

How will a seller price his product if he is unaware of the price his customer has previously paid another supplier? The plaintiff assumes that he will quote a price based on cost and a "satisfactory profit." (Br. p. 28) The district court on the other hand found, on the basis of the facts, that when competing in ignorance of competitive prices, there was a tendency to quote too high. Only a public utility, insulated from competition but regulated to prevent gouging, can price as the government suggests. Moreover, what is cost and what is a satisfactory profit? In this industry, not only do costs vary from plant to plant, but in each plant each additional order which increases production as a percentage of capacity reduces unit cost. Is cost the marginal cost for the additional production, or the average cost for the plant's entire production? Is a 5% profit "satisfactory" in normal times or is it sometimes 1% or less or even a small loss if that is necessary to keep the plant going? The plaintiff offered no proof and now simply avoids these questions, ignoring the fact that each company's pricing, both here and for any

commodity readily available from other suppliers, must be based on competition and cannot be determined by cost and a "satisfactory profit."

One of the defendants, Crown Zellerbach, once attempted to do what the plaintiff urges. It published a price list and instructed its personnel to sell all its products at precisely list price. The result was that competitors knew they could take the business away from Crown by quoting a lower price, and they did so. Crown lost so much business in an experiment of several months duration with this plan that it had to abandon it, and return to pricing by meeting or beating competition, rather than on any basis of cost plus a satisfactory profit. (CX-7, pp. A 704-5 [Tr. Jan. 26, 1966 p. 138] [App. 903-4])

6. Knowledge as to price alternatives is not inherently anticompetitive

The plaintiff's theory is this: Whether by agreement or infrequent casual practice, and whatever the motive, when a trader learns the price at which a competitor most recently sold his product, the Sherman Act is violated because, with that information, his admittedly independent pricing decision might be different from what it would be in a state of ignorance, and this is an unlawful effect.

Thus, if one grocer reads the newspaper advertisements of his competitor across the street and learns that there is a special on eggs, he might charge a different price for his eggs than if this information were not available to him. The effect is no different if there is no advertisement but he learns his competitor's price from a customer; nor is it different if he telephones his competitor to check on the price reported to him by a customer who is known to him

often to claim falsely that the prices in other stores are lower.

The same is true of information as to any economic factors which would influence his pricing decision, such as the general level of industrial activity, the rate of unemployment, freight carloadings (which are particularly relevant for a manufacturer of shipping cartons) and general price trends in his and other industries. Is all such information anticompetitive or, as this Court has pointed out, does not free competition work best when the traders in the marketplace are best informed? For there should be no mistake about the central issue here. The plaintiff is asserting the *per se* illegality of knowledge, in the absence of any agreement, understanding or practice whereby the freedom of the individual trader is restricted in any fashion, and where each pricing decision by each trader was admittedly made as a matter of its own individual decision after taking into account all of the relevant economic factors upon which such a decision should properly be based.

The clue to the fallacy of the plaintiff's thinking is its assertion that a trader, ignorant of the price at which competitors have recently sold their product (a fact which the purchasers, of course, know), might offer his own product at a lower price. The district court found, on the evidence, that in fact in this industry a defendant often offered his product at a higher price when he did not know what others had last charged (F. 19(e) [App. 493]). But what has this to do with a complaint alleging an agreement to restrict competition? It is not enough to argue that information as to competitors' recent prices *could* be part of the mechanics for implementation of an arrangement to restrict price competition. That mere possibility does not

prove an agreement in restraint of trade, particularly in the context of the contrary findings of the district court here.

Why should not information as to prices for corrugated containers remain as freely available as for commodities traded on various commodity exchanges? Or in other industries where prices are posted or otherwise freely disseminated? What peculiarly requires that a seller of corrugated containers compete in ignorance of information that the buyer already possesses? For it is the mere receipt of knowledge which is on trial here, and not any agreement to use that knowledge to restrict competition or any evidence that any defendant in any way tempered the vigor of competition.

The lower court's findings of fact were based upon stipulated or uncontroverted facts agreed to by the plaintiff. Upon that record we submit that the district court quite properly followed this Court's decisions and correctly refused to announce a new rule of law in the absence of factual foundation for it. The plaintiff had every opportunity to develop such a factual premise and was unable to do so. It should not be heard to ask this Court to pronounce a novel and far-reaching doctrine in disregard of the guidelines so carefully laid down in the *White Motors* case.

Conclusion

The judgment below should be affirmed.

Dated: November 2, 1968

Respectfully submitted,

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
JAMES W. HARBISON, JR.
120 Broadway
New York, New York 10005
Attorneys for Container Corporation of America

SIMPSON THACHER & BARTLETT
Of Counsel

JOSEPH C. CARTER, JR.
700 East Main Street
Richmond, Virginia 23212
Attorney for Albemarle Paper Manufacturing Company and Miller Container Corporation

HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
Of Counsel

W. P. Sandridge
W. F. Womble
Drawer No. 84
Winston-Salem, North Carolina
27102
Attorneys for Carolina
Container Company

Womble, Carlyle, Sandridge
& Rice
Of Counsel

Helmer R. Johnson
Charles E. Lewis
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Continental
Can Company, Inc.

Willkie Farr & Gallagher
Of Counsel

Howard T. Milman
Robert D. Krumme
48 Wall Street
New York, New York 10005
Attorneys for Crown
Zellerbach Corporation

Sullivan & Cromwell
Of Counsel

David J. Mays
John W. Edmonds III
1200 Ross Building
Richmond, Virginia 23219
Attorneys for Dixie Container
Corporation and Dixie Container
Corporation of North Carolina

Mays, Valentine, Davenport
& Moore
Of Counsel

ALAN W. BOYD
LOUIS A. HIGHMARK
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Attorneys for Inland Container Corporation

BARNES, HICKAM, PANTZER & BOYD
Of Counsel

LAWRENCE E. WALSH
HENRY L. KING
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for International Paper Company

DAVIS POLK & WARDWELL
Of Counsel

FORD W. EKEY
JON M. SEBALY
Talbott Tower
Dayton, Ohio 45402
Attorneys for The Mead Corporation

SMITH & SCHNACKE
Of Counsel

FRED E. FULLER
JAMES A. SPRUNK
405 Madison Avenue
Toledo, Ohio 43604
Attorneys for Owens-Illinois Glass Company

FULLER, SENEY, HENRY & HODGE
Of Counsel

RICHARD A. WHITING
ROBERT M. GOOLRICK
1250 Connecticut Avenue
Washington, D. C. 20036
Attorneys for St. Joe Paper Company

STEPTOE & JOHNSON
Of Counsel

HORACE R. LAMB
H. RICHARD WACHTEL
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for St. Regis Paper Company

LEBOEUF, LAMB, LEIBY
& MACRAE
Of Counsel

JAMES H. EPPS, JR.
JAMES A. WELLER
2101 North Roan Street
Johnson City, Tennessee 37601
Attorneys for Tri-State
Container Corporation

EPPS, POWELL, WELLER,
TAYLOR AND MILLER
Of Counsel

JAMES R. WITHROW, JR.
2 Wall Street
New York, New York 10005
Attorney for Union Bag-Camp
Paper Company

DONOVAN LEISURE NEWTON
& IRVINE
Of Counsel

E. Nobles Lowe
299 Park Avenue
New York, New York 10017
Attorney for West Virginia Pulp and Paper Company

Fred B. Helms
800 North Carolina National Bank Building
Charlotte, North Carolina 28202
Attorney for Weyerhaeuser Company

Helms, Mulliss, McMillan & Johnston
Of Counsel